Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1161

COHOES HOUSING AUTHORITY,

Petitioner,

—against—

IPPOLITO-LUTZ, INC.,

Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Petitioner has made a number of statements in its Reply Brief which are completely at odds with the Record in this case and cannot be allowed to go unanswered.

On page 2 of its Reply Brief, Petitioner contends that the stipulation entered into between Petitioner and Respondent (expunging from the Record certain affidavits which were not properly part of the Record) did not constitute a stipulation that these papers were "improper." This is simply not so. The stipulation was entered into only after Respondent had moved to dismiss Petitioner's appeal in the Appellate Division because Petitioner had placed in the printed record those very four affidavits, none of which had been before the Court when the motion being appealed from was decided. These affidavits had never been served

upon Respondent and of course, Respondent never even had an opportunity to respond thereto. A copy of this stipulation appears as Appendix "A" of this brief.

Petitioner further states in its Reply Brief that when these same affidavits were included in the records before the Appellate Division, Third Department (on motion to reargue), and before the Court of Appeals of the State of New York on Petitioner's motion for leave to appeal, that "no attempt was made to have these papers deleted." This is also not true. There was no motion procedure available by which objection *could* be taken; the only avenue of protest was by way of answering affidavits on each of the aforementioned motions.

Objection *was* taken in the affidavits submitted in opposition in each instance and, in each case, a letter sent to the Clerk of the Court reiterating Respondent's protests. Copies of those letters are annexed hereto as Appendix "B" and "C."

On page 3 of its Reply Brief, Petitioner appears to be arguing that the record before the New York Courts was in some way defective because the original Notice for Discovery and Inspection was not included. The Notice was not a part of the record for the simple reason that it had been part of the record on Respondent's earlier motion for an order compelling Petitioner to comply, at which time the propriety and scope of the Notice had been litigated and a decision rendered by Special Term that the Notice was entirely proper, that the items sought by the Notice were material and necessary to the prosecution of the action, and directing Petitioner to comply immediately therewith. The later motion (which resulted in the striking of Petitioner's

answer) was to punish for failure to comply with this prior order of the Court. The Notice was no longer in question, and was not properly a part of the record. The only issue at that point was Petitioner's blatant refusal to obey the prior order of the Court directing it to comply with the Notice.

Petitioner also appears to be arguing (on page 3 of the Reply Brief) that the stipulation entered into between the parties expunging the affidavits which had improperly been included in the Record by Petitioner was made pursuant to New York State Procedures which permit parties to stipulate to an appendix method of appeal and include only those parts of the record which they deem germane to the appeal. The stipulation in question was not entered into in accordance with any such procedure. It was executed because, in the midst of a motion to dismiss its appeal, Petitioner conceded that it had improperly included in its purported record affidavits which had not been before the Court at Special Term when it reached its decision to strike the answer and which had never been served upon Respondent.

Guarnacci v. *Ferguson,* 29 A.D.2d 839 (4th Dept., 1968) is no authority whatever for Petitioner's contention. In *Guarnacci* the Court simply held that an appeal could not be prosecuted upon a patently insufficient record, from which pertinent portions of the testimony had been omitted by stipulation. The appeal was stricken from the calendar and the appellant directed to file a supplementary record. *Guarnacci* in no way supports Petitioner's apparent contention that affidavits which were *not* a part of the papers before the Court at Special Term when it decided a motion can, under any circumstances, be made a part of the record on an appeal from the decision on that motion.

Lastly, Petitioner points out that Respondent, too, has referred to matters outside the record and that this, somehow, legitimizes Petitioner's own excursions. Indeed, it is hard to see how Petitioner's misstatements and misrepresentations of the record could have been discussed otherwise. We regret the necessity of so doing; Petitioner's own conduct left us no choice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ALBERT FOREMAN
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Attorneys for Respondent
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New York, New York 10017
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APPENDICES

APPENDIX A

Stipulation

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

IPPOLITO-LUTZ, INC.,

Plaintiff,

—against—

COHOES HOUSING AUTHORITY,

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the Record on Appeal, heretofore prepared and copies of which were filed, uncertified, with the Appellate Division, Third Department on the appeal herein shall have omitted and removed therefrom, pages 37 through and including 59, and that all material contained in the Brief of Defendant-Appellant, which refers to the aforesaid omitted and removed material, shall likewise be removed, and that upon presentation of the original of the Record on Appeal which has been amended as aforesaid, the attorney for the plaintiff-respondent agrees to stipulate to its correctness as the Record on Appeal herein, and that the same may thereafter be filed with the Appellate Division, Third Department.

Dated: November 4, 1968

M. CARL LEVINE, MORGULAS & FOREMAN
Attorneys for Plaintiff-Respondent

MURPHY, ALDRICH, GUY, BRODERICK & SIMON
Attorneys for Defendant-Appellant

APPENDIX B

July 29, 1975

Honorable
J. Clarence Herlihy, Presiding Justice
Appellate Division, Third Department
Justice Building
Albany, New York

Re: *Ippolito-Lutz, Inc.* v. *Cohoes Housing Authority*

Dear Judge Herlihy:

The writer regrets imposing on this Court's time by addressing to it a post-motion letter, but the receipt by this office of movant's reply papers one day *after* the motion was marked "submitted" mandates a brief letter.

Predictably, Appellant again argues the question of the five post-motion affidavits. To recapitulate briefly:

The affidavits in question were, concededly, *not* before the Court at Special Term when it decided the Respondent's motion and were, therefore, not a proper part of the record on the appeal from that decision. Appellant so stipulated, after a motion to expunge had been made. Appellant itself then removed the affidavits from the physical record before this Court on Appeal, but did not remove references to and summaries of those affidavits from his brief. Respondent, thereupon moved before this Court to dismiss the appeal and this Court granted that motion, dismissing the appeal unless Appellant removed the material which was the subject of the motion. Appellant did

not appeal that order or make any move to reargue. Rather, Appellant proceeded to place the appeal on the Calendar of this Court, but *without* removing the offending material from its brief—in *direct defiance* of the order of this Court.

Now, Appellant is once again arguing that the affidavits should have been part of the record, and persists in making the same argument that was made before this Court on oral argument. Most of what Mr. Noonan has to say has been fully dealt with in our answering affidavit with only a few additional comments.

When Justice Pennock refused to sign an order to show cause for reargument, Appellant could have proceeded by normal notice of motion. Appellant *did not do this.* Mr. Noonan now says that any further effort would have been "futile" (p. 2 of Respondent's affidavit of July 25, 1975). This is hardly the case. Had a motion to reargue been made and Respondent given, thereby, an opportunity to *reply* to the contents of the affidavits in question), and *then* denied, Appellant could have appealed the denial of that motion and the original motion together, on a full record. This Appellant *did not do.* It can hardly come before this Court *now* and argue that the Court should do for it what it failed to do for itself nine years ago.

On page 3, Appellant now makes an argument (not made on oral argument before this Court (and barely touched on in its brief) that the application of CPLR §3215 to the entry of judgment be reconsidered. The answer to this is brief and simple. First of all, the entry of a default judgment under CPLR §3215 is not appealable *per se* (see

Practice Commentary of David Siegel, McKinney's Consolidated Laws of New York, Book 7B, CPLR §3215, p. 881). The proper and *only* procedure is to move to vacate that judgment under CPLR §3215 and appeal the denial of that motion. Such a motion must be made within *one year* of the entry of the judgment under CPLR §5015(a). This Appellant did not do so, and the time has long since passed to complain about any alleged technical irregularity in the entry of the judgment. Furthermore, the order of Pennock, J. (May 11, 1967) contains the following provision: "Therefore, the Court determines that the issues to which the information was requested is relevant and shall be *deemed resolved for the purposes of the action in accordance with the allegations of the complaint.*"

Accordingly, judgment could be entered by the Clerk without further proceedings, which would have been merely redundant.

Finally, Mr. Noonan refers to the case of *Feingold* v. *Walworth Bros. Inc.*, 238 N.Y. 446, as holding that the "question of whether or not there was sufficient evidence before the Court to warrant the striking of an Answer is a 'matter of law' ". The *Feingold* case announces no such general rule. The issue there was whether the answers of certain co-defendants could be stricken because a certain *other* co-defendant had failed to comply with a discovery order dealing with documents and information wholly within *his* control. That was, indeed, a "question of law", but it has nothing whatever to do with the issues here involved.

It is respectfully submitted that Appellant's motions for "reargument" and for leave to appeal should be denied, in toto, with costs to Respondent.

Respectfully,

M. Carl Levine, Morgulas & Foreman

By Jerrold Morgulas

JM/jmb

cc: William E. Noonan, Esq.
Martin, Noonan, Hislop, Troue & Shudt

APPENDIX C

October 3, 1975

Mr. Jack Gary, Motion Clerk
Court of Appeals
Court of Appeals Hall
Eagle Street
Albany, New York 12207

Re: *Ippolito-Lutz, Inc.* v. *Cohoes Housing Authority*
(Motion For Leave To Appeal)

Dear Mr. Gary:

We are herewith filing, under separate cover, our answering affidavit and memorandum of law in opposition to the motion by Cohoes Housing Authority for leave to appeal to the Court of Appeals.

As I stated to you during our telephone conversation last week, the appellant has included, in the bound document, which he refers to as "Notice of Motion, Moving Affidavit and *Supporting Papers*", a series of affidavits which were *not part of the record on appeal before the Appellate Division, Third Department.* Furthermore, appellant has made copious references to those documents and to the circumstances attendant upon them *in the brief* which he has submitted in support of his motion for leave to appeal. As I stated to you, the appellant had agreed *by written stipulation* dated November 4, 1968, to remove the offending documents from the record and, also, to remove all references thereto from his brief. We enclose herewith a photostatic copy of that stipulation, as ENCLOSURE "A".

Thereafter, appellant did, in fact, finally remove pages 37-59 from the copies of the printed record previously filed in the Appellate Division, Third Department. We are enclosing a xerox copy of our only remaining copy of that record for your easy reference. (ENCLOSURE "C")

Due to the fact that appellant had failed and refused to *remove from his brief* the references to the affidavit appearing on pages 37-59 of the original filed record, a motion was made in the Appellate Division, Third Department, to dismiss the appeal unless appellant did remove the offending references and serve a corrected brief. This motion was granted and an order conditionally dismissing the appeal was entered on May 6, 1975, a copy of which is annexed as ENCLOSURE "B". Appellant *did not,* in fact, correct his brief, and made oral application at the time of argument to be relieved both of the stipulation and the effect of the order of the Appellate Division of May 6, 1975, which application was promptly denied. The Court, thereupon, heard the appeal and affirmed it unanimously.

Now, as part of what appellant has denominated as "Moving Affidavit and Supporting Papers" (at pages 25-41), it has *once again included the offending affidavits.* You will note that the pages, as reproduced, are exact photocopies of the pages of the original record, and still bear the original pagination, clearly showing that they are *pages 39-53* of the original record, precisely those pages *which were removed pursuant to stipulation of November 4, 1968,* the terms of which stipulation were subsequently reinforced by the May 6, 1975 order of the Appellate Division, Third Department, from which, we may note, no appeal was ever taken.

Plaintiff-respondent vigorously protested what we believe to be a gross violation of rules of procedure and the wholly improper inclusion of material which was not part of the record before the Appellate Division, Third Department. Accordingly, we wrote to appellant's attorney, on September 19, 1975 (ENCLOSURE "D"), and demanded removal of the offending material. Appellant has refused to comply.

We note that Court of Appeals Rule 500.9(a) specifically states that a motion for permission to appeal "shall be based on a copy of the record in the Court below". Appellant has completely disregarded the requirement of this rule and, instead of serving "a copy of the record in the Court below" in support of his present motion, has concocted an entire new record for himself and thrust it before this Court as part of his moving papers.

It is respectfully submitted that, under the circumstances and for the foregoing reasons, appellant's motion should be stricken from the calendar.

Very truly yours,

M. CARL LEVINE, MORGULAS & FOREMAN

By: JERROLD MORGULAS

cc: WILLIAM E. NOONAN, Esq.